

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION**

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UNITED STATES OF AMERICA, et al.

Plaintiffs,

v.

DAIRY FARMERS OF AMERICA, INC., et al.

Defendants.

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Civil Action No.: 6:03-206-KSF

**PLAINTIFF UNITED STATES' STATEMENT OF UNDISPUTED  
FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY  
JUDGMENT AS TO DEFENDANT DAIRY FARMERS OF  
AMERICA'S ESTOPPEL AND WAIVER AFFIRMATIVE DEFENSES**

In support of its Motion for Partial Summary Judgment as to Defendant Dairy Farmers of America's Estoppel and Waiver Affirmative Defenses, Plaintiff United States relies on the following undisputed facts:

- 1) On April 24, 2003, the United States and the Commonwealth of Kentucky filed a complaint seeking the divestiture of Southern Belle dairy by Defendant Dairy Farmers of America, Inc. ("DFA") and a finding that DFA's partial acquisition of Southern Belle by DFA is a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and K.R.S. § 367.110 *et seq.*
- 2) As part of its Answer filed June 17, 2003, DFA asserted as affirmative defenses that "Plaintiff United States is estopped from asserting, or has waived the right to assert, that DFA's acquisition of a partial ownership interest in Southern Belle Dairy Co., LLC violates Section 7 of the Clayton Act based on its prior actions involving predecessor cooperatives to DFA." Answer of DFA at 10.
- 3) The estoppel and waiver defenses asserted by DFA do not apply to the Commonwealth of Kentucky.

- 4) On August 29, 2003, the government submitted to DFA an interrogatory pursuant to Federal Rules of Civil Procedure 26 and 33 asking it to:

Identify and describe all facts and other information regardless of date that support any of the affirmative defenses asserted in DFA's Answer (including each specific representation or misrepresentation, instances of affirmative misconduct, or any other action or inaction taken by any representative of the United States that you contend is relevant to DFA's affirmative defenses that the "United States is estopped from asserting, or has waived the right to assert, that DFA's acquisition of a partial ownership interest in Southern Belle Dairy Co., LLC violates Section 7 of the Clayton Act based on its [the United States'] prior actions involving predecessor cooperatives to DFA"), and identify all persons with knowledge of such facts and other information.

United States' First Request for Answers to Interrogatories and First Request for Document Production at 9-10. A true and correct copy of this discovery request is attached as Exhibit 1 to this Statement of Undisputed Facts.

- 5) On October 17, 2003, DFA responded to the government's interrogatory quoted above by stating, after reiterating general objections to the interrogatories, that:

DFA and its predecessor cooperatives have been involved in numerous investigations by the Department of Justice (the "Department") during the past eight years. The effect of DFA's ownership of partial interest in competing dairy processors were a part of such investigations, and with regard to some such investigations, a critical part. During such investigations, representatives of the Department have stated, and taken action consistent therewith (or affirmatively agreed or failed to disagree, to raise objections, and/or concerns) that the Department lacks any evidence whatsoever that DFA's simultaneous investment in competing fluid milk processors lessened competition in any relevant market. Accordingly, without waiving the foregoing objections, and while DFA does not have records of every statement, omission or act by the Department with regard to such matters, DFA can state that the following attorneys for the Department made such communications or took such actions on or about the following dates: March 2003, R. Hewitt Pate, Esq., Deborah Platt-Majoras, Esq., Mark Botti, Esq., John Read, Esq., J.D. Donaldson, Esq. and others regarding DFA's acquisition of a partial ownership interest in [Southern Belle]; October 2002, Mark J. Botti, Esq., John Read, Esq., J.D. Donaldson, Esq., and others the same transaction; in October 2001, William

Kolasky, Esq., Mark Botti, Esq. and others regarding the acquisition of Dean Foods Company by Suiza Foods Corporation; late 1999 Joan S. Huggler, Esq. regarding the acquisition of Southern Foods Group, L.P., by Suiza Dairy Group, L.P.; August 1997, A. Douglas Melamed, Esq. and Donna N. Kooperstein, Esq. regarding the acquisition of Borden/Meadow Gold by Mid-America Dairymen, Inc. (DFA's predecessor in interest); August 1997, Michael P. Harmonis, Esq. and Joan S. Huggler, Esq. regarding the aforementioned Borden / Meadow Gold transaction.

DFA further refers Plaintiff to the affirmative action taken by the Department with respect to the 1995 transaction between Land-O-Sun Dairies, Inc. ("LOS") and Flav-O-Rich, Inc. ("FOR") whereby divestitures of milk distribution routes were permitted from one entity affiliated with Mid-America Dairymen, Inc. (LOS) to another (Valley Rich, LLC). Specifically, to resolve the competitive concerns raised by the Department regarding competition between the LOS and FOR fluid milk processing plants owned by each that supplied school districts and other customers in Virginia, West Virginia, North Carolina, South Carolina, and Tennessee, the Department required LOS to divest certain milk distribution routes to Valley Rich, LLC ("Valley Rich"), which was also 50% owned by DFA's predecessor in interest at the time. DFA is further able to identify the following information that supports its affirmative defenses at this time: [listing press releases and references to general document productions]."<sup>1</sup>

DFA's Responses to United States' First Request for Answers to Interrogatories and First Request for Document Production at Interrogatory Responses at 12-13. A true and correct copy of DFA's interrogatory response is attached as Exhibit 2 to this Statement of Undisputed Facts.

- 6) The allegation that the government made statements or acted in a manner suggesting that it lacked certain types of evidence, even if assumed true for argument, is not an allegation of intentional affirmative misconduct.
- 7) On their face, the alleged affirmative actions described in the interrogatory response quoted in paragraph 5 regarding the 1995 merger between Land-O-Sun Dairies, Inc. and Flav-O-Rich, Inc., even if assumed true for argument, related to the government's exercise of its prosecutorial discretion to resolve a possible violation of the antitrust laws.

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<sup>1</sup> The context for some of the documents described by DFA are described below at paragraphs 11-13, with copies of the documents attached as exhibits.

- 8) On their face, all of the other documents identified in the interrogatory response quoted in paragraph 5 also relate to the exercise of prosecutorial discretion by the government to resolve possible violations of the antitrust laws.
- 9) In the interrogatory response quoted in paragraph 5, DFA does not allege (or provide facts from which a reasonable factfinder could find) that it justifiably and detrimentally relied on any intentional affirmative misrepresentations by the government when it acquired its interest in the Southern Belle dairy.
- 10) In the interrogatory response quoted in paragraph 5, DFA does not identify any action or statement by any representative of the government intentionally relinquishing the right to challenge the partial acquisition of Southern Belle Dairy Co., LLC by DFA.
- 11) In 1995, Land-O-Sun Dairies, Inc. merged with Flav-O-Rich, Inc. The government approved the transaction after the parties to the transaction agreed to divest certain assets. A true and correct copy of a press release announcing the government's decision to let the transaction proceed is attached as Exhibit 3 to this Statement of Undisputed Facts.
- 12) In 1997, the government entered into a consent decree allowing Mid-America Dairymen, Inc. to acquire the assets of Borden/Meadow Gold Dairies, Inc. A true and correct copy of a press release announcing the entry of the consent decree allowing the transaction to proceed is attached as Exhibit 4 to this Statement of Undisputed Facts.
- 13) On March 18, 1999, the government filed a complaint in this Court seeking to enjoin the proposed acquisition of Broughton Foods Company (which owned the Southern Belle dairy in Somerset, Kentucky) by Suiza Food Corporation (which owned the Flav-O-Rich dairy in London, Kentucky). A true and correct copy of the complaint is attached as Exhibit 5 to this Statement of Undisputed Facts. The government and the parties to the transaction submitted a proposed final judgment allowing the transaction to proceed, on the condition that Suiza divest the Southern Belle dairy to a third party. A true and correct copy of the final judgment entered by this Court is attached as Exhibit 6 to this Statement of Undisputed Fact.
- 14) On July 16, 2002, Gary Hanman, Chief Executive Officer of DFA, was deposed by the government pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1311-14, and testified that he was aware that when evaluating Suiza Food Group's proposed acquisition of Broughton Foods, the government expressed antitrust concerns regarding the possible common ownership of the Southern Belle and Flav-O-Rich dairies and required that Southern Belle be divested before it would allow the transaction to proceed. A true and correct copy of the relevant portions of Hanman's deposition transcript are attached as Exhibit 7 to this Statement of Undisputed Facts.

Respectfully submitted,

January 9, 2004

\_\_\_\_\_/s/\_\_\_\_\_  
John R. Read  
N. Christopher Hardee  
J.D. Donaldson  
Ihan Kim  
U.S. Department of Justice  
Antitrust Division  
1401 H Street, N.W., Suite 4000  
Washington, DC 20530  
202-307-0001

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION**

UNITED STATES OF AMERICA, et al.,

*Plaintiffs,*

v.

Civil Action No.: 6:03-206-KSF

DAIRY FARMERS OF AMERICA, INC., et al.,

*Defendants.*

**UNITED STATES' FIRST REQUEST FOR ANSWERS TO INTERROGATORIES  
AND FIRST REQUEST FOR DOCUMENT PRODUCTION  
FROM DEFENDANT DAIRY FARMERS OF AMERICA, INC.**

Pursuant to FRCP 26, 33, and 34, plaintiff United States hereby requests that defendant Dairy Farmers of America, Inc., answer the following interrogatories, and produce the following documents, within 30 days of service hereof.

**I. PRELIMINARY STATEMENT**

These interrogatories and document requests are intended in part to discover information relevant to your affirmative defenses, which have been asserted without specific supporting factual allegations. If you believe the production of information required by this Request can be reduced through the specification, narrowing, or elimination of any issues relating to your affirmative defenses, or any other issues, you are encouraged to discuss this with plaintiffs.

**II. DEFINITIONS**

1. "And" and "or" as used herein have both conjunctive and disjunctive meanings.
2. "Capital expenditure" means any improvements with a total cost of \$40,000 or

3. Pursuant to FRCP 26(e), your obligation to provide information requested by these interrogatories is continuing in nature. If you obtain actual or constructive knowledge of any such information at any time after responding to them, that information should be provided to plaintiff United States.

4. In responding to this Request, produce all documents in your possession or custody or subject to your control or otherwise available to you, regardless of whether the documents are possessed directly by you. These include all documents located at the offices of your affiliates that you can obtain if you ask or demand them from your affiliate.

5. If any portion of a document is responsive to this Request, produce the entire document. If any document contains privileged material, produce the entire document with the privileged material redacted. Preserve all documents and parts of a document withheld under a claim of privilege. For each document or part of a document withheld under a claim of privilege, provide an appropriate privilege log.

6. Produce documents responsive to this Request in the order that they appear in your files. Do not separate any documents that are stapled, clipped, or otherwise fastened together. Documents in folders should be produced in identical folders (including all notations). Place all documents requested by this Request in separate folders or boxes bearing the name of the person and the office or division from which the documents were produced.

#### IV. INTERROGATORIES

1. Identify and describe all facts and other information regardless of date that support any of the affirmative defenses asserted in DFA's Answer (including each specific representation or misrepresentation, instances of affirmative misconduct, or any other action or inaction taken

by any representative of the United States that you contend is relevant to DFA's affirmative defense that the "United States is estopped from asserting, or has waived the right to assert, that DFA's acquisition of a partial ownership interest in Southern Belle Dairy Co., LLC violates Section 7 of the Clayton Act based on its [the United States'] prior actions involving predecessor cooperatives to DFA"), and identify all persons with knowledge of such facts and other information.


2. Identify each dairy or DFA affiliate whose actions or whose relationship with DFA is probative of DFA's asserted affirmative defense that DFA "cannot and has not controlled or influenced the behavior of either Southern Belle dairy or Flav-O-Rich dairy in a manner that would lessen competition with regard to the sale of milk to schools," state the time period over which each dairy's actions or relationship offers probative information of DFA's asserted defense, and describe all facts and other information that support this defense.

3. Identify each set of dairies in which DFA or any DFA affiliate has had an interest where the conditions of the marketplace where those dairies operated were such that one or more of those dairies could have profitably raised the price of school milk if those dairies were to act in a manner that would lessen competition among them in the sale of school milk; state the time period over which DFA or its affiliate held an interest in those dairies over which the competitive conditions were such that one or more of those dairies would have profited from such lessened competition; and identify each school system that you believe would likely have had to pay higher prices if competition among the identified dairies were lessened.

4. If DFA could have benefitted from facilitating or encouraging any DFA affiliates to act in a manner that would lessen competition among them, identify those DFA affiliates, state



For Plaintiff United States of America

A handwritten signature in dark ink, appearing to read "JD Donaldson", is written over a horizontal line.

John R. Read

JD Donaldson

U.S. Department of Justice

Antitrust Division - Litigation I Section

1401 H Street, NW - Suite 4000

Washington, DC 20530

202-307-0001

Dated: August 29, 2003

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION

UNITED STATES OF AMERICA, and  
COMMONWEALTH OF KENTUCKY,

*Plaintiffs,*

v.

DAIRY FARMERS OF AMERICA, INC., and  
SOUTHERN BELLE DAIRY CO., LLC,

*Defendants.*

Civil Action No.: 03-206-KSF

DEFENDANT DAIRY FARMERS OF  
AMERICA, INC.'S RESPONSES TO PLAINTIFF  
UNITED STATES OF AMERICA'S FIRST REQUEST FOR ANSWERS  
TO INTERROGATORIES AND FIRST REQUEST FOR DOCUMENT PRODUCTION

Defendant Dairy Farmers of America, Inc. ("DFA"), by and through its attorneys, hereby objects and responds to Plaintiff United States of America's First Request For Answers to Interrogatories And First Request For Document Production From Defendant Dairy Farmers of America, Inc. (Plaintiff's Discovery Requests") as follows:

**I. GENERAL OBJECTIONS**

The following general objections are hereby incorporated into each and every response below to each and every interrogatory and document request served by Plaintiff.

24. In the event that DFA inadvertently produces any information or document in response to any request or interrogatory that is or may be the subject of any of the foregoing objections, such production or response is not intended to be, nor shall it be deemed to be, a waiver of the objection with respect to the produced document or information. DFA reserves the right to demand the return of all copies of any such documents.
25. Nothing in these responses, including the production of documents, shall be deemed a waiver of any claim, privilege, defense, immunity, or objection to which DFA may be entitled.
26. DFA reserves the right to supplement or amend these objections, as well as the specific responses and objections set forth below.
27. DFA incorporates by reference herein its General Objections to each of Plaintiff's interrogatories and document requests and further objects and responds as follows:

## **II. INTERROGATORIES**

1. **Identify and describe all facts and other information regardless of date that support any of the affirmative defenses asserted in DFA's Answer (including each specific representation or misrepresentation, instances of affirmative misconduct, or any other action or inaction taken by any representative of the United States that you contend is relevant to DFA's affirmative defense that the "United States is estopped from asserting, or has waived the right to assert, that DFA's acquisition of a partial ownership interest in Southern Belle Dairy Co., LLC violates Section 7 of the Clayton Act based on its [the United States'] prior actions involving predecessor cooperatives to DFA"), and identify all persons with knowledge of such facts and other information.**

**RESPONSE:** DFA incorporates by reference all applicable General Objections, as if fully restated herein, and no specific objection is intended to waive or modify any General Objection. DFA objects to Interrogatory 1 on the grounds that it is overly broad and unduly burdensome. DFA further objects to this interrogatory on the ground that it would require DFA to produce records that are subject to the attorney/client, work product or potentially other evidentiary privileges. DFA and its predecessor cooperatives have been involved in numerous investigations by the Department of Justice (the "Department") during the past eight years. The effect of DFA's ownership of partial interests in competing dairy processors were a part of such investigations, and with regard to some such investigations, a critical part. During such investigations, representatives of the Department have stated, and taken action consistent therewith (or affirmatively agreed or failed to disagree, to raise objections, and/or concerns) that the Department lacks any evidence whatsoever that DFA's simultaneous investment in competing fluid milk processors lessened competition in any relevant market. Accordingly, without waiving the foregoing objections, and while DFA does not have records of every statement, omission or act by the Department with regard to such matters, DFA can state that the following attorneys for the Department made such communications or took such actions on or about the following dates: March 2003, R. Hewitt Pate, Esq., Deborah Platt-Majoras, Esq., Mark Botti, Esq., John Read, Esq., J.D. Donaldson, Esq. and others regarding the DFA's acquisition of a partial ownership interest in SBD; October 2002, Mark J. Botti, Esq., John Read, Esq., J.D. Donaldson, Esq. and others regarding the same transaction; in October 2001, William Kolasky, Esq., Mark Botti, Esq. and others regarding the acquisition of Dean Foods Company by Suiza Foods Corporation; late 1999 Joan S. Huggler, Esq. regarding the acquisition of Southern Foods

Group, L.P. by Suiza Dairy Group, L.P.; August 1997, A. Douglas Melamed, Esq. and Donna N. Kooperstein, Esq. regarding the acquisition of Borden/Meadow Gold by Mid-America Dairymen, Inc. (DFA's predecessor in interest); August 1997, Michael P. Harmonis, Esq. and Joan S. Huggler, Esq. regarding the aforementioned Borden/Meadow Gold transaction.

DFA further refers Plaintiff to the affirmative action taken by the Department with respect to the 1995 transaction between Land-O-Sun Dairies, Inc. ("LOS") and Flav-O-Rich, Inc. ("FOR") whereby divestitures of milk distribution routes were permitted from one entity affiliated with Mid-America Dairymen, Inc. (LOS) to another (Valley Rich, LLC). Specifically, to resolve the competitive concerns raised by the Department regarding competition between the LOS and FOR fluid milk processing plants owned by each that supplied school districts and other customers in Virginia, West Virginia, North Carolina, South Carolina, and Tennessee, the Department required LOS to divest certain milk distribution routes to Valley Rich, LLC ("Valley Rich"), which was also 50% owned by DFA's predecessor in interest at the time. DFA is further able to identify the following information that supports its affirmative defenses at this time:

- (a) 1997 Final Judgment in *United States v. Mid-America Dairymen, Inc. and Southern Foods Group L.P.*;
- (b) August 29, 1997 Letter from W. Todd Miller to Michael P. Harmonis regarding proposed acquisition of Borden/Meadow Gold by Mid-America Dairymen, Inc. and subsequent communications regarding this letter;
- (c) Department of Justice Antitrust Division Press Release dated September 27, 1995, relating to the satisfactory conclusion of the investigation into the acquisition of FOR by LOS;

- (d) Department of Justice Antitrust Division Press Release dated September 3, 1997, relating to the satisfactory conclusion of the investigation into the acquisition of Borden/Meadow Gold by Southern Foods Group L.P.;
- (e) Documents and depositions relating to NDH's proposed acquisition of the assets of H.P. Hood Inc.;
- (f) Documents and depositions relating to DFA's partial acquisition of SBD;
- (g) Documents and depositions relating to Suiza Foods, Inc.'s acquisition of Dean Foods, Inc.;
- (h) Documents relating to Suiza Dairy Group L.P.'s acquisition of Southern Foods Group L.P.;
- (i) All documents and depositions relating to Southern Foods Group L.P.'s acquisition of Borden/Meadow Gold;
- (j) All documents and depositions relating to LOS' acquisition of FOR;
- (k) Complaint filed by the Department and the Commonwealth in this action;
- (l) To the extent available, the remaining answers to Interrogatory 1 may be derived or ascertained from the business records of DFA and documents previously produced to the Department in prior investigations of DFA and its predecessor in interest, including but not limited to documents produced in response to the Civil Investigative Demands and investigations identified in the General Objections. The burden of deriving or ascertaining such information is substantially the same for Plaintiff as it is for DFA. DFA, therefore, exercises its option pursuant to

Federal Rule of Civil Procedure 33, and subject to the General and specific Objections, to produce the non-privileged documents that contain information responsive to this Interrogatory.

2. **Identify each dairy or DFA affiliate whose actions or whose relationship with DFA is probative of DFA's asserted affirmative defense that DFA "cannot and has not controlled or influenced the behavior of either Southern Belle dairy or Flav-O-Rich dairy in a manner that would lessen competition with regard to the sale of milk to schools," state the time period over which each dairy's actions or relationship offers probative information of DFA's asserted defense, and describe all facts and other information that support this defense.**

**RESPONSE:** DFA incorporates by reference all applicable General Objections, as if fully restated herein, and no specific objection is intended to waive or modify any General Objection. DFA objects to Interrogatory 2 on the grounds that it is overly broad and responding thereto would be unduly burdensome. DFA and its predecessor cooperatives have had investments in dozens of dairies; DFA's relationship with each of these is to varying degrees "probative" of DFA's affirmative defense referenced in this Interrogatory. By the same token, DFA's relationship with every dairy in which it does not have any ownership interest is to varying degrees "probative" of DFA's affirmative defense. To describe all facts or other information that support DFA's affirmative defense with regard to each dairy (regardless of DFA ownership) would take immeasurable amounts of time, particularly since such facts and information establish a negative: that there is no credible evidence that DFA has acted to influence or attempt to influence the competitive behavior of any of fluid milk processing company in which it has an ownership interest with regard to that company's sale of milk to schools. Accordingly, DFA further objects to the interrogatory on the ground that it is vague and

DAIRY FARMERS OF AMERICA, INC.

By: *David A. Geisler*

Title: Corporate Vice President - Legal

STATE OF MISSOURI )

COUNTY OF PLATTE )

Subscribed and sworn to before me by David A. Geisler, the Corporate Vice President - Legal of Dairy Farmers of America, Inc., for and on behalf of Dairy Farmers of America, Inc., on this the 17th day of October, 2003.

My Commission expires:

**"NOTARY SEAL"**  
Marsha A. Irwin, Notary Public  
Clay County, State of Missouri  
My Commission Expires 10/3/2006

*Marsha A. Irwin*  
\_\_\_\_\_  
NOTARY PUBLIC



STATE OF \_\_\_\_\_ )

COUNTY OF \_\_\_\_\_ )

Subscribed and sworn to before me by \_\_\_\_\_, the \_\_\_\_\_ of  
Dairy Farmers of America, Inc., for and on behalf of Dairy Farmers of America, Inc., on this the  
\_\_\_\_\_ day of \_\_\_\_\_, 2003.

My Commission expires: \_\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

As to Objections:



\_\_\_\_\_  
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Counsel for Defendant  
Dairy Farmers of America, Inc.



## Department of Justice

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FOR IMMEDIATE RELEASE  
WEDNESDAY, SEPTEMBER 27, 1995

AT  
(202) 616-2771  
TDD (202) 514-1888

**JUSTICE DEPARTMENT APPROVES DAIRY MERGER**  
**AFTER PARTIES AGREE TO DIVESTITURE**

WASHINGTON, D.C. -- The Department of Justice approved a \$48 million acquisition involving two dairy companies--one from Tennessee and the other from Kentucky--after requiring certain changes to the deal that will assure that school milk prices in Virginia, West Virginia, North Carolina, South Carolina and Tennessee remain competitive.

The acquisition by Land-O-Sun Dairies Inc. of Flav-O-Rich Inc. was approved today by the Department's Antitrust Division after Mid-America Dairymen Inc., the owner of Flav-O-Rich, agreed to divest milk distribution routes to a strong third party competitor.

Anne K. Bingaman, Assistant Attorney General in charge of the Antitrust Division, said, "This transaction could have increased milk prices to school districts in the Southeast. This spin-off will preserve competition, which is especially important in markets like this one, where there has been a history of collusion that has hurt consumers."

(MORE)

- 2 -

In several of the markets affected, the bidding process previously was subject to bid rigging collusion by competing dairies, the Department said.

In the past, the Department has charged the two companies with participating in conspiracies to rig bids on contracts to supply milk and other dairy products to public schools. Criminal charges against Land-O-Sun were filed in 1989 and 1992 in which the company pleaded guilty and paid fines totalling \$3.9 million. Criminal charges were filed against Flav-O-Rich in 1991 and 1992 in which the company pleaded guilty and paid fines totalling \$12.8 million.

Initially, the Antitrust Division told the parties that the deal as originally structured could lessen competition in the sale of milk to many school districts in five southeastern states--Virginia, West Virginia, North Carolina, South Carolina and Tennessee. For some of these school districts, Land-O-Sun and Flav-O-Rich were the only two dairies submitting bids to sell milk, the Department noted.

School districts purchase milk in half-pint containers. They have specific delivery and service requirements and use dairies with distribution systems in the district to service them. Contracts are typically awarded each year after a formal bidding process.

The Department said that, due to the importance of the distribution system, the divesting of these routes to Valley Rich

(MORE)

- 3 -

Dairy of Roanoke, Virginia, will assure that competition is maintained in the school districts.

Valley Rich is a strong competitor in the bidding for school milk contracts in geographic areas close to those where Land-O-Sun and Flav-O-Rich compete, the Department noted.

Land-O-Sun Dairies Inc., headquartered in Johnson City, Tennessee, owns and operates fluid milk processing plants and ice cream plants. It sells and distributes its fluid milk and other products to a variety of customers, including school districts. In 1994, it had total revenues of approximately \$202 million.

Flav-O-Rich Inc. a subsidiary of Mid-America Dairymen Inc., headquartered in Springfield, Missouri, also owns and operates fluid milk processing plants and ice cream plants. Flav-O-Rich sells its fluid milk and other products to a variety of customers, including school districts. Flav-O-Rich's 1994 total revenues were approximately \$220 million.

###

95-506

**JUSTICE DEPARTMENT REQUIRES MID-AMERICA DAIRYMEN INC. TO SELL  
BORDEN/MEADOW GOLD DAIRIES IN ORDER FOR DEAL TO GO FORWARD**

**Revised Deal Ensures that School Milk Prices Remain Competitive;  
Dairies will be Sold in Texas, Louisiana, New Mexico**

WASHINGTON, D.C. -- Mid-America Dairymen Inc.--the largest dairy cooperative in the United States--will be allowed to acquire Borden/Meadow Gold Dairies Holdings Inc. as long as Mid-

America sells Borden dairies in Texas, Louisiana and New Mexico to another competitor, under a settlement filed today by the Department of Justice. A newly-formed firm, Milk Products LLC, will be allowed to buy the divested dairies under certain conditions set out in the proposed settlement.

The Department's Antitrust Division said that if Mid-America's acquisition of Borden had gone forward as originally proposed, it would have reduced competition for the sale of milk to public schools throughout eastern Texas and virtually all of Louisiana. A total of nine plants will be sold--five in Texas, three in Louisiana and one in New Mexico.

"Recently, we have rooted out and prosecuted many cases of criminal collusion in the sale of milk to schools, which resulted in higher prices for schools," said Joel I. Klein, Assistant Attorney General in charge of the Department's Antitrust Division. "It is important that we act to prevent mergers or acquisitions that might have the same effect."

Schools that participate in the U.S. Department of Agriculture's national school lunch and breakfast programs are required to offer fluid milk with every meal. The schools usually seek bids from the dairy firms that operate delivery routes in their area on an annual basis. Throughout much of Texas and Louisiana, Southern Foods Group LP, in which Mid-America has a partial ownership interest, and Borden are the only two bidders for school milk contracts.

A complaint and proposed settlement were filed today in U.S. District Court in Dallas. The proposed settlement, if approved by the court, would settle the suit.

The transaction as originally proposed would have included the spin-off of Borden's Texas and Louisiana operations to Milk Products, which is expected to be based in Dallas, with Mid-America financing most of the purchase price.

The complaint alleges that the original remedy was inadequate because the loan would have left Mid-America with the ability to influence the operations of Milk Products. Combined with its partial ownership of Southern Foods, the loan would have given Mid-America the incentive and ability to limit competition between the two dairy firms.

The settlement will maintain competition by requiring Mid-America to divest the Borden dairy operations located in Texas, Louisiana, and New Mexico and by placing limits on the terms and duration of any loans to Milk Products.

The settlement also requires Mid-America to reduce any loans to zero by September 1, 1999, and places strict limits on Mid-America's access to information about Milk Products.

Mid-America, headquartered in Springfield, Missouri, has more than 18,000 dairy farmer members in 30 states. It also has partial ownership interests in a number of dairy firms, including 50 percent of Southern Foods Group LP, which has extensive dairy processing operations in Texas and Louisiana.

Borden/Meadow Gold, headquartered in Ogden, Utah, has 25 dairy processing plants in the western half of the U.S., including eight located in Texas and Louisiana.

Southern Foods Group LP is headquartered in Dallas.

As required by the Tunney Act, the proposed consent decree will be published in the Federal Register. Any person may submit written comments concerning the proposed decree during a 60-day comment period to Roger W. Fones, Chief, Transportation, Energy and Agriculture Section, Antitrust Division, U.S. Department of Justice, 325 7th Street, N.W., Suite 500, Washington, D.C. 20530 (202/307-6351).

At the conclusion of the 60-day comment period, the U.S. District Court in Dallas may enter the consent decree upon a finding that it serves the public interest.

###

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION

Eastern District of Kentucky

FILED

MAR 18 1999

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

Suiza Foods Corporation,

d/b/a Flav-O-Rich Dairy,  
Land O' Sun Dairy,  
Louis Trauth Dairy, and

Broughton Foods Company,

d/b/a Southern Belle Dairy,

*Defendants.*

AT LONDON  
DEBIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

Civil Action No.:

99-130

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to prevent the proposed acquisition by Suiza Foods Corporation ("Suiza") of the stock of Broughton Foods Company ("Broughton"), and alleges as follows:

1. Suiza and Broughton each own milk processing plants ("dairies") in South Central Kentucky and bid against each other to sell milk to school districts

located there. Competition between Suiza and Broughton in South Central Kentucky has resulted in lower prices and better service for school districts that supply milk to their students.

2. Defendants are the only two firms that bid to supply school milk in parts of Kentucky. In these areas, the acquisition will create a monopoly. In other areas, the number of bidders will decline from three to two, reducing competition substantially.

3. School milk sales have suffered from a history of criminal antitrust violations. Bid rigging has occurred in many of the same counties where the proposed acquisition would eliminate competition. Indeed, the proposed acquisition would recreate the effect of a criminal bid-rigging conspiracy that raised milk prices to Kentucky schools and school children for over a decade.

4. Less than a year ago, defendant Broughton predicted in a letter to the United States Department of Agriculture ("USDA"), dated May 26, 1998, that school milk prices in certain Kentucky school districts (including a number involved in this case) would rise if its Southern Belle Dairy in Somerset, Kentucky, were not a competitor for school milk sales in Kentucky and Tennessee:

If Southern Belle is suspended . . . it will lose the opportunity to bid. . . . The school districts, for their part, will face higher bid prices with the elimination of a competitor from the marketplace.

5. The proposed acquisition of Broughton by Suiza is likely to lessen



competition substantially, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

### I. JURISDICTION AND VENUE

6. This Complaint is filed under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(b), (c).

7. Suiza is a Delaware corporation doing and transacting business in the Eastern District of Kentucky, London Division, and one of its dairies relevant to the alleged violation of law is located in London, Kentucky.

8. Broughton is an Ohio corporation doing and transacting business in the Eastern District of Kentucky, London Division, and one of its dairies relevant to the alleged violation of law is located in Somerset, Kentucky.

9. Suiza and Broughton sell milk and other dairy products in the flow of interstate commerce. Defendants' activities in processing and selling milk and other dairy products also substantially affect interstate commerce. This Court has jurisdiction over the subject matter of this action and the parties pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

## II. DEFENDANTS

10. Suiza is a Delaware corporation with headquarters in Dallas, Texas. Suiza had sales of approximately \$1.8 billion in 1997.

11. In South Central Kentucky, Suiza conducts its dairy operations through its Land O' Sun division in London, Kentucky, and Bristol and Kingsport, Tennessee, and through its Louis Trauth Dairy division in Newport, Kentucky. Using the Flav-O-Rich, PET and Trauth names, Suiza distributes its products to grocery stores, convenience stores, schools, and institutions from its dairies located in London and Newport, Kentucky; and Bristol and Kingsport, Tennessee.

12. Broughton is an Ohio corporation with its headquarters in Marietta, Ohio. Broughton had sales of approximately \$87.2 million in 1997.

13. In South Central Kentucky, Broughton, using the Southern Belle and Broughton's names, distributes its products to grocery stores, convenience stores, independent distributors, schools, and institutions from its dairies in Somerset, Kentucky and Marietta, Ohio.

## III. PROPOSED TRANSACTION

14. On September 10, 1998, Suiza and Broughton entered into an agreement and plan of merger, pursuant to which Suiza intends to purchase all of the stock of Broughton for \$109.7 million and assume Broughton liabilities of \$13 million.

#### IV. DESCRIPTION OF COMMERCE

##### A. MILK INDUSTRY

15. The milk industry is comprised of milk processors (dairies) that purchase raw milk from dairy farmers and agricultural cooperatives, pasteurize and package it, and then sell the processed product known in the industry as fluid milk. Milk processors with specialized filler equipment can package milk in half pint containers.

##### B. SCHOOL MILK CUSTOMERS

16. School milk customers are school districts that purchase half pint containers of milk for school breakfast and lunch programs. The majority of milk packaged in half pint containers is sold directly to school districts or to independent distributors who resell it to school districts.

17. School districts in the counties listed in Attachment A ("South Central Kentucky") participate in the National School Lunch and School Breakfast Programs ("School Meal Programs") of the Food and Nutrition Service of the USDA. The school districts that participate in this program receive federal payments for each eligible student with low family income; the eligible students then receive free or reduced price meals from their school district. School districts that participate in a School Meal Program must offer for sale a half-pint package of milk to every student who wants one.

18. Each county in South Central Kentucky operates a school district.

There are also separate municipal public school districts in some counties. Each of these school districts is responsible for purchasing school milk. Each school district annually solicits bids from dairies and distributors located within South Central Kentucky, and some school districts in the region solicit bids from dairies located outside South Central Kentucky. The proposed acquisition is likely to harm competition for the supply of school milk in at least 55 school districts in South Central Kentucky. These school districts are listed in Attachment B ("South Central Kentucky School Districts").

#### C. SALE OF MILK TO SCHOOLS AND OTHER CUSTOMERS

19. When dairies sell to schools, they either deliver the milk directly by their own delivery services or they deliver through independent distributors. Direct store delivery ("DSD") routes consists of direct milk delivery to customers' retail locations. Products sold on DSD routes includes school milk and dairy products sold to supermarkets, convenience stores and restaurants.

20. The defendants operate the only two dairies that supply school milk to South Central Kentucky School Districts and that are also located within South Central Kentucky. These dairies are Suiza's Flav-O-Rich dairy in London and Broughton's Southern Belle dairy in Somerset. Defendant Suiza also sells school milk to school districts on the fringe of this region from its dairies in Newport,

Kentucky (Louis Trauth) and Bristol, Tennessee (Land O' Sun).

21. The volume of school milk business is relatively small compared to other milk delivery business in most areas. Moreover, school districts rely on dairies to furnish certain delivery services. For example, dairies now servicing South Central Kentucky School Districts provide milk storage coolers, daily or every-other-day delivery to each school, delivery within limited hours, and constant rotation of older stock and replacement of expired stock.

22. In describing Broughton's school milk operations in connection with *State of Ohio v. Louis Trauth Dairy, Inc.*, C-1-93-553 (S.D. Ohio) in 1995, an expert for Broughton stated:

[D]istribution of school milk is a function of [Broughton's] overall business. . . . All school milk is piggy-backed onto deliveries going to Broughton's commercial (wholesale) customers like grocery and convenience stores. That means, in turn, that Broughton's school-milk bidding is very much determined by the location of its other, commercial customers. . . . Broughton bids aggressively year after year for the same school districts . . . served in tandem with the vastly more important commercial customers that are the long-term bulwarks of Broughton's business. Broughton never goes looking for new school accounts by themselves; indeed the reverse is true. Only as Broughton attracts new commercial business does the possibility of serving nearby schools become attractive. (Statement Concerning Broughton Foods Company by Fred S. McChesney, Sep. 23, 1995, at 2-3.)

Similar conditions prevail today in South Central Kentucky.

23. Defendants Suiza and Broughton integrate school route deliveries and other milk delivery business into their DSD routes when serving school districts in

South Central Kentucky. As the President and CEO of Broughton elaborated to the USDA last year:

Most schools, when you are bidding schools, have to be fit in with all your other business along that route. You could not just have a school on your route and furnish it milk. . . . It would be too expensive, and they would not buy it. They [schools] would serve them Coke.  
(Statement of Phil Cline, President and CEO of Broughton Foods Company, before the United States Department of Agriculture, Jan. 15, 1998, Tr. at 41).

24. Generally, dairies other than Suiza and Broughton do not have the significant milk delivery business, DSD route structure, distribution branches, and other economic conditions that would make them meaningful competitors for the sale of school milk in most of South Central Kentucky.

25. Generally, distributors are not independent competitors for the sale of school milk. Distributors deliver school milk within South Central Kentucky. Most commonly, however, the dairy bids on the school milk business and the distributor acts as the dairy's agent by delivering it. In other instances, distributors bid separately on the school milk business and then buy their milk from a dairy. Virtually all distributors, whether they bid separately from a dairy, or deliver on behalf of a dairy to the South Central Kentucky School Districts, obtain their supply of milk from one of the defendants' dairies.

## V. LIKELY ANTICOMPETITIVE EFFECTS

### A. THE RELEVANT PRODUCT MARKET

26. Milk is a product that has special nutritional characteristics and has no practical substitutes. Dairies that sell milk to schools provide certain services, including coolers to store the milk, daily or every-other-day delivery service to each school, limited hours delivery, and constant rotation of older stock and replacement of expired stock.

27. There are no other beverages that school districts would substitute for milk in the event of a small but substantial price increase for school milk. School districts must provide milk in order to receive substantial federal funds under the School Meal Programs. If the price of school milk rose by a small but significant amount, school districts would be forced to pay the price increase.

28. A relevant product market in which the competitive effects of the proposed acquisition may be assessed is the sale of milk to schools (school milk). School milk is a relevant product market (i.e., a "line of commerce") within the meaning of Section 7 of the Clayton Act.

### B. THE RELEVANT GEOGRAPHIC MARKETS

29. A relevant geographic market within which to assess the competitive effects of the proposed acquisition is South Central Kentucky, and narrower markets contained therein, including each of the South Central Kentucky School

Districts. As a practical matter, South Central Kentucky School Districts would be unable to turn to additional school milk producers not currently bidding or not currently intending to bid for school milk contracts within South Central Kentucky School Districts to supply them with school milk if the price of school milk were to increase by a small but significant amount.

30. South Central Kentucky and the South Central Kentucky School Districts constitute relevant geographic markets (*i.e.*, a "section of the country") within the meaning of Section 7 of the Clayton Act.

#### C. PRIOR COLLUSION ON SCHOOL MILK SALES

31. According to the then President and CEO of Southern Belle, Flav-O-Rich, Inc. conspired with Southern Belle to raise prices by agreeing on which company would submit the winning bid for which school district. (Statement of Martin Shearer, Hearing For Filing of Information, Arraignment & Plea, Sep. 3, 1992, *United States v. Southern Belle Dairy Co.*, CR-92-36, E.D. Ky., Tr. at 17-19). Consequently, Southern Belle pled guilty in United States District Court in the Eastern District of Kentucky, and Flav-O-Rich, Inc. pled guilty in United States District Court in the Northern District of Georgia (consolidating allegations filed in the Eastern and Western Districts of Kentucky, the Eastern District of Tennessee, the Middle District of North Carolina, the Southern District of Mississippi, the District of South Carolina, and the Northern District of Georgia) to the felony of bid



rigging school milk prices to over 30 county and independent school systems within South Central Kentucky beginning at least as early as the late 1970s and continuing through 1989. See *United States v. Southern Belle Dairy Co.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,599 (E.D. Ky. Nov. 13, 1992); *United States v. Flav-O-Rich, Inc.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,605 (N.D. Ga. Dec. 22, 1992). Districts whose school milk contracts were rigged included school systems in the following South Central Kentucky counties: Adair, Barren, Bell, Casey, Clay, Clinton, Cumberland, Garrard, Hart, Jackson, Knott, Knox, Laurel, Lincoln, McCreary, Metcalfe, Perry, Pulaski, Rockcastle, Russell, Taylor, Wayne and Whitley. Southern Belle paid a \$375,000 criminal fine; Flav-O-Rich paid \$1,750,000. No other dairies and no distributors were charged with participating in this conspiracy.

32. Flav-O-Rich, Inc. was acquired by Land O' Sun Dairies, L.L.C., in September 1995. Defendant Suiza acquired Land O' Sun in February 1998. Defendant Broughton acquired Southern Belle in December 1997.

33. After its bid-rigging prosecution, Southern Belle faced debarment as a seller of school milk under USDA regulations. In 1997, Broughton appealed the proposed debarment, filed statements with the USDA and participated in a transcribed USDA meeting. Final USDA action is now pending.

#### D. HARM TO COMPETITION

34. After they pled guilty to rigging bids to the school districts affected, Southern Belle and Flav-O-Rich took steps to once again compete against each other. Today, the successor-owner of the Flav-O-Rich dairy (Suiza) and the successor-owner of the Southern Belle dairy (Broughton) compete against each other to supply school milk to school districts in South Central Kentucky. As Broughton's attorneys stated in 1998, "Southern Belle . . . is now a strong competitor and often the low bidder for school milk and other government contracts." (Letter from Joseph L. Ruby, *Wiley, Rein & Fielding*, to Yvette Jackson, *Acting Administrator, Food and Consumer Service, USDA*, Jan. 23, 1998, at 2). The competition between the defendants has ensured that South Central Kentucky School Districts benefit from lower prices and higher quality service.

35. The proposed acquisition will reduce the number of competitors in some South Central Kentucky School Districts from three to two. Only two competitors would remain in the following 32 school districts: Allen County, Anderson County, Barbourville Independent, Barren County, Bell County, Berea Independent, Bourbon County, Burgin Independent, Campbellsville Independent, Caverna Independent, Corbin Independent, East Bernstadt Independent, Glasgow Independent, Harrodsburg Independent, Hart County, Henry County, Jessamine County, Knott County, Knox County, Laurel County, Madison County, McCreary

County, Menifee County, Metcalfe County, Middlesboro Independent, Pineville Independent, Pulaski County, Science Hill Independent, Somerset Independent, Taylor County, Whitley County, and Williamsburg Independent.

36. Dairies bid on each school milk contract separately. Where the acquisition would reduce the number of bidders on these contracts from three to two, the likelihood that the remaining bidders will bid less aggressively against each other on both price and service terms is significantly increased.

37. In explaining to the USDA why Southern Belle should not be debarred, Broughton stated that many of the South Central Kentucky School Districts, including those in which there have been three bidders, "will face higher bid prices with the elimination of a competitor from the marketplace." (Letter from Joseph L. Ruby, Wiley, Rein & Fielding, to George A. Braley, *Program Analysis and Monitoring Branch, Food and Nutrition Service, USDA*, May 26, 1998, at 2). Hence, defendant Broughton predicted that it is likely that prices would rise in Kentucky when three school milk competitors are reduced to two.

38. Furthermore, the history of school milk bid rigging indicates that school milk markets are conducive to collusion. Future coordinated activity in this industry could take the form of customer allocation, as in the past, and result in higher bid prices, lower quality, or less favorable delivery service terms. The proposed acquisition would likely increase the danger of tacit or overt collusion in

those school districts where the acquisition would reduce the number of firms competing to provide school milk from three to two.

39. Moreover, in other South Central Kentucky School Districts, the effect of the proposed acquisition would be to establish a monopoly. A monopoly would be created in the following 23 school districts: Adair County, Breathitt County, Casey County, Clark County, Clay County, Clinton County, Cumberland County, Garrard County, Hazard Independent, Jackson County, Jackson Independent, Lee County, Leslie County, Letcher County, Lincoln County, Mercer County, Monticello Independent, Owsley County, Perry County, Rockcastle County, Russell County, Wayne County, and Woodford County. In these counties, the proposed acquisition would give the merged firm the ability to raise prices or to decrease the level or quality of service provided to these school districts.

#### E. ENTRY CONDITIONS

40. In explaining to USDA why Southern Belle was an "important" supplier to "very small school districts in Kentucky" and should not be debarred, Broughton stated that "many of these are rural districts in the mountains of eastern Kentucky. These districts would likely find it difficult to attract alternative suppliers from more distant locations." Defendant Broughton elaborated on this at a transcribed USDA meeting, stating that:

if you look at the geographical area that gets these low number of bids, one or two, these . . . . are very small communities with poor roads and

very small schools. This is not an area where you can expect a large outside dairy company to make a major investment of establishing routes and to move in. (Statement of Joseph L. Ruby, Wiley Rein & Fielding, Counsel for Broughton Foods Company, before the United States Department of Agriculture, Jan. 15, 1998, Tr. at 30-31).

41. Defendant Broughton predicted that eliminating it as a competitor in South Central Kentucky would reduce competition and allow prices to increase above the competitive level. Notably, it did not predict that entry would deter any anticompetitive price increase.

42. Entry by other dairies or distributors will not be timely, likely or sufficient to deter any anticompetitive effect caused by the acquisition. Dairies or distributors are unlikely to decide that it has become profitable to compete for this low margin, low volume, seasonal business as a result of a small but significant increase in school milk prices.

## VI. VIOLATION ALLEGED

43. The acquisition would have the following effects, among others:
- A. competition generally in the production and sale of school milk in South Central Kentucky School Districts would likely be substantially lessened;
  - B. actual and potential competition between Suiza and Broughton in the production and sale of school milk in South Central Kentucky would be eliminated; and
  - C. the prices for school milk would likely increase, and the quality of service in the sale of school milk would likely decline, in the relevant geographic markets.

44. Unless restrained, the proposed acquisition will violate Section 7 of the Clayton Act.

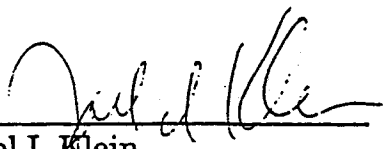
#### VII. REQUEST FOR RELIEF

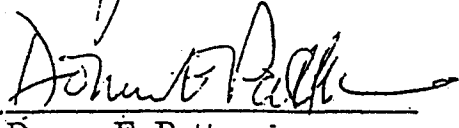
45. The United States requests that this Court:

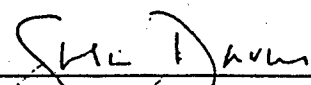
- A. adjudicate that defendant Suiza's proposed acquisition of Broughton would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;
- B. preliminarily and permanently enjoin defendant Suiza from carrying out the proposed acquisition, or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to combine the businesses or assets of Broughton and Suiza;
- C. award the United States the costs of this action; and
- D. award such other relief as is proper.


Respectfully submitted,

For Plaintiff United States of America:

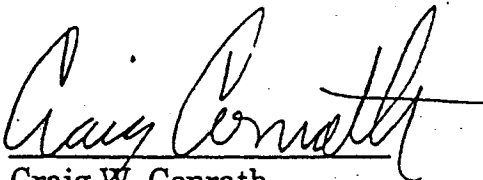
  
Joel I. Klein  
Assistant Attorney General

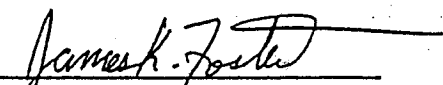
  
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U.S. Department of Justice  
1401 H St., N.W.  
Suite 4000  
Washington, DC 20530  
(202) 307-0001

Dated: March 18, 1999

**ATTACHMENT A**  
**South Central Kentucky**

Adair County  
Allen County  
Anderson County  
Barren County  
Bell County  
Bourbon County  
Breathitt County  
Casey County  
Clark County  
Clay County  
Clinton County  
Cumberland County  
Garrard County  
Hart County  
Henry County  
Jackson County  
Jessamine County  
Knott County  
Knox County  
Laurel County  
Lee County  
Leslie County  
Letcher County  
Lincoln County  
Madison County  
McCreary County  
Menifee County  
Mercer County  
Metcalf County  
Owsley County  
Perry County  
Powell County  
Pulaski County  
Rockcastle County  
Russell County

Taylor County  
Wayne County  
Whitley County  
Woodford County



ATTACHMENT B  
South Central Kentucky School Districts

Adair County  
Allen County  
Anderson County  
Barbourville Independent  
Barren County  
Bell County  
Berea Independent  
Bourbon County  
Breathitt County  
Burgin Independent  
Campbellsville Independent  
Casey County  
Caverna Independent  
Clark County  
Clay County  
Clinton County  
Corbin Independent  
Cumberland County  
East Bernstadt Independent  
Garrard County  
Glasgow Independent  
Harrodsburg Independent  
Hart County  
Hazard Independent  
Henry County  
Jackson County  
Jackson Independent  
Jessamine County  
Knott County  
Knox County  
Laurel County  
Lee County  
Leslie County  
Letcher County  
Lincoln County  
Madison County

McCreary County  
Menifee County  
Mercer County  
Metcalf County  
Middlesboro Independent  
Monticello Independent  
Owsley County  
Perry County  
Pineville Independent  
Pulaski County  
Rockcastle County  
Russell County  
Science Hill Independent  
Somerset Independent  
Taylor County  
Wayne County  
Whitley County  
Williamsburg Independent  
Woodford County



**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF KENTUCKY**  
**LONDON DIVISION**

**FILED**

**UNITED STATES OF AMERICA**

*Plaintiff,*

VS.

**SUIZA FOODS CORPORATION**

**d/b/a Louis Trauth Dairy,  
Land O' Sun Dairy, and  
Flav-O-Rich Dairy, and**

**BROUGHTON FOODS COMPANY,**

**d/b/a Southern Belle Dairy**

*Defendants.*

Civil Action No. 99-CV-130

AT LONDON  
LESLIE G. WATMER  
CLERK, U. S. DISTRICT COURT

**FINAL JUDGMENT**

WHEREAS plaintiff the United States of America (hereinafter "United States"), having filed its Complaint herein, and defendants, by their attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

AND WHEREAS, the defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, prompt and certain divestiture of certain assets to a third party is the essence of this agreement;

AND WHEREAS, plaintiff requires defendants to divest, as a viable business, the Southern Belle Dairy so as to ensure, to the sole satisfaction of the plaintiff, that the Acquirer will be able to continue to operate the Southern Belle Dairy as a viable, ongoing business;

AND WHEREAS, defendants have represented to plaintiff that the divestiture required below can and will be made as provided in this Final Judgment and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over the subject matter of this action and over each of the parties hereto. The Complaint states a claim upon which relief may be granted against the defendant under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

**DEFINITIONS**

**As used in this Final Judgment:**

A. "Acquirer" means the person(s) to whom defendants shall sell the Southern Belle Dairy (as defined below).

B. "Southern Belle Dairy" means the entire milk processing plant owned by Broughton Foods Company located in Pulaski County, Kentucky, and all related assets, including all rights and interests in it, including all property and contract rights, all existing inventory, accounts receivable, pertinent correspondence and files, customer lists, all related customer information, advertising materials, contracts or other relationships with suppliers, customers and distributors, any rights, contracts and licenses involving intellectual property, trademarks, tradenames or brands, computers and other physical assets and equipment used for production at, distribution from, or associated with, Southern Belle Dairy or any of its distribution branches and locations.

C. "Suiza Foods Corporation" means defendant Suiza Foods Corporation and includes its successors and assigns, their subsidiaries, divisions, groups, partnerships and joint ventures, affiliates, directors, officers, managers, agents and employees.

D. "Broughton Foods Company" means defendant Broughton Foods Company and includes its successors and assigns, their subsidiaries, divisions,

groups, partnerships and joint ventures, affiliates, directors, officers, managers, agents and employees.

### III.

#### APPLICABILITY

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns, their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Southern Belle Dairy may not be sold to an Acquirer that has not agreed to be bound by the provisions of this Final Judgment.

### IV.

#### DIVESTITURE OF ASSETS

A. Suiza Foods Corporation is hereby ordered and directed, within six (6) months from the date this Final Judgment is filed with the Court, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Southern Belle Dairy to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to an extension of this time period of up to one (1) month, and shall notify the Court in such circumstances.

B. Unless the United States consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Southern Belle Dairy defined above. Divestiture shall be accomplished in such a way as to satisfy the United States, in its sole discretion that the Southern Belle Dairy can and will be operated by the Acquirer as a viable, ongoing business. Divestiture of the Southern Belle Dairy, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to a purchaser for whom it is demonstrated to the sole satisfaction of the United States that (1) the purchase is for the purpose of competing effectively in the dairy business, (2) the Acquirer has the managerial, operational, and financial capability to compete effectively in the dairy business; and (3) that none of the terms of any agreement between the Acquirer and defendant give defendant the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

C. In accomplishing the divestiture ordered by this Final Judgment, Suiza Foods Corporation shall make known, by usual and customary means, the availability of the Southern Belle Dairy. Suiza Foods Corporation shall provide any person making inquiry regarding a possible purchase a copy of the Final Judgment. The defendants shall also offer to furnish to any bona fide prospective purchaser, subject to customary confidentiality assurances, all information regarding the Southern Belle Dairy customarily provided in a due diligence process, except such

information subject to attorney-client privilege or attorney work product privilege. Defendants shall make available such information to the plaintiff at the same time that such information is made available to any other person. Defendants shall permit bona fide prospective purchasers of the Southern Belle Dairy to have access to personnel and to make such inspection of physical facilities and any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

D. Defendants shall not interfere with any negotiations by the Acquirer to employ any employee whose primary responsibility is the production, sale, marketing, or distribution of products from the Southern Belle Dairy.

E. Suiza Foods Corporation shall take all reasonable steps to accomplish quickly the divestiture contemplated by this Final Judgment. Defendants shall not take any action that will impede in any way the operation of the Southern Belle Dairy other than in the ordinary course of their other business.

## V.

### APPOINTMENT OF TRUSTEE

A. In the event that Suiza Foods Corporation has not divested the Southern Belle Dairy within the time period specified in Section IV. A., it shall notify the plaintiff of that fact in writing. In the event that Suiza Foods Corporation has not divested the Southern Belle Dairy within the time period specified in Section IV. A., and upon application of the United States, the Court shall appoint a trustee selected



by the United States to effect the divestiture of the Southern Belle Dairy. Unless the plaintiff otherwise consents in writing, the divestiture shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Southern Belle Dairy can and will be operated by the Acquirer as a viable on-going business.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Southern Belle Dairy. The trustee shall have the power and authority to accomplish the divestiture at the best price then obtainable upon a reasonable effort by the trustee, subject to the provisions of Sections IV, V and VIII of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Section V. C. of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestiture, and such professionals and agents shall be solely accountable to the trustee. The trustee shall have the power and authority to accomplish the divestiture at the earliest possible time to a purchaser acceptable to the United States, and shall have such other powers as this Court shall deem appropriate. Defendants shall not object to a sale by the trustee on any grounds other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the plaintiffs and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

C. The trustee shall serve at the cost and expense of Suiza Foods Corporation, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Suiza Foods Corporation and the trust shall then be terminated. The compensation of such trustee and that of any professionals and agents retained by the trustee shall be reasonable in light of the value of the Southern Belle Dairy and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Suiza Foods Corporation shall use its best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of, and relating to, the Southern Belle Dairy, and defendants shall develop financial or other information relevant to such assets customarily provided in a due diligence process as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture. Defendants shall permit prospective acquirers of the assets to have

reasonable access to personnel and to make such inspection of physical facilities and any and all financial, operational, or other documents and other information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Southern Belle Dairy, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to divest the Southern Belle Dairy. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee shall thereupon promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to

the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI.

NOTIFICATION

A. Within two (2) business days following execution of a definitive agreement, Suiza Foods Corporation or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the plaintiff of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Suiza Foods Corporation. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or desire to, acquire any ownership interest in the Southern Belle Dairy, together with full details of the same. Within fifteen (15) calendar days after receipt of the notice, the plaintiff may request from Suiza Foods Corporation, the proposed purchaser, or any third party additional information concerning the proposed divestiture, the proposed purchaser, and any other potential purchaser. Suiza Foods Corporation or the trustee shall furnish the additional information within fifteen (15) calendar days of the receipt of the request. Within thirty (30)

calendar days after receipt of the notice or within twenty (20) calendar days after receipt of the additional information by the United States, whichever is later, the United States shall notify in writing Suiza Foods Corporation and the trustee, if there is one, whether or not it objects to the proposed divestiture. If the United States notifies in writing Suiza Foods Corporation and the trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to Suiza Foods Corporation's limited right to object to the sale under Section V. B. Absent written notice that the United States does not object to the proposed purchaser or upon objection by the United States, a divestiture proposed under Section IV or V may not be consummated. Upon objection by Suiza Foods Corporation under Section V. B., the proposed divestiture under Section V shall not be accomplished unless approved by the Court.

B. Twenty (20) calendar days from the date of the filing of this Final Judgment, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Suiza Foods Corporation shall deliver to the plaintiff a written affidavit as to the fact and manner of compliance with Section IV or V of this Final Judgment. Each such affidavit shall include, for each person who during the preceding thirty (30) calendar days made an offer, expressed an interest or desire to acquire, entered into negotiations to acquire, or made an inquiry about acquiring any ownership interest in all or any portion of the Southern Belle Dairy, the name, address, and telephone number of that person and a detailed description of

each contact with that person during that period. Each such affidavit shall also include a description of the efforts that Suiza Foods Corporation has taken to solicit a buyer for the relevant assets and to provide required information to prospective purchasers including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to the information provided by the defendant, including limitations on information, shall be made within fourteen (14) calendar days of receipt of such affidavit. Suiza Foods Corporation shall maintain full records of all efforts made to divest all or any portion of the Southern Belle Dairy.

VII.

FINANCING

Suiza Foods Corporation shall not finance all or any part of any purchase of the Southern Belle Dairy made pursuant to Sections IV or V of this Final Judgment.

VIII.

HOLD SEPARATE REQUIREMENTS

Unless otherwise indicated, from the date of filing of this proposed Final Judgment with the Court and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished:

A. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V

of the Final Judgment has been accomplished, Suiza Foods Corporation shall preserve, maintain, and operate the Southern Belle Dairy as an independent competitor with management, production, sales and operations held entirely separate, distinct and apart from those of Suiza Foods Corporation. Suiza Foods Corporation shall not coordinate the production, marketing or sale of products from Southern Belle Dairy's business with the business that it will own as a result of the acquisition of Broughton Foods Company.

B. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, Suiza Foods Corporation shall take all steps reasonably necessary to ensure that the Southern Belle Dairy will be maintained and operated as an independent, ongoing, economically viable and active competitor in the production and sale of products; that the management of the Southern Belle Dairy will not be influenced by Suiza Foods Corporation, and that the books, records, competitively sensitive sales, marketing and pricing information, and decision-making associated with the Southern Belle Dairy will be kept separate and apart from the operations of Suiza Foods Corporation. Suiza Foods Corporation's influence over the Southern Belle Dairy shall be limited to that necessary to carry out its obligations under the Final Judgment. Suiza Foods Corporation may receive historical aggregate financial information (excluding capacity or pricing information) relating to the Southern Belle Dairy to the extent necessary to allow Suiza Foods

Corporation to prepare financial reports, tax returns, personnel reports, and other necessary or legally required reports including provision of due diligence information required to be made available pursuant to this Final Judgment.

C. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, Suiza Foods Corporation shall use all reasonable efforts to maintain the operations of the Southern Belle Dairy, and shall maintain at current or previously approved levels, whichever are higher, internal funding, promotional, advertising, sales, technical assistance, marketing and merchandising support for the Southern Belle Dairy.

D. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, Suiza Foods Corporation shall provide and maintain sufficient working capital to maintain the Southern Belle Dairy as an economically viable, ongoing business.

E. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, Suiza Foods Corporation shall provide and maintain sufficient lines and sources of credit to maintain the Southern Belle Dairy as an economically viable, ongoing business.



F. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, Suiza Foods Corporation shall take all steps reasonably necessary to ensure that the Southern Belle Dairy is fully maintained in operable condition at no lower than its current rated capacity levels, and shall maintain and adhere to normal repair and maintenance schedules for the Southern Belle Dairy.

G. Suiza Foods Corporation shall not, except as part of a divestiture approved by plaintiff, remove, sell, lease, assign, transfer, pledge or otherwise dispose of or pledge as collateral for loans, any assets of the Southern Belle Dairy.

H. The management of Southern Belle Dairy shall maintain, in accordance with sound accounting principles, separate, true, accurate and complete financial ledgers, books and records that report, on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, income, profit and loss of the Southern Belle Dairy.

I. Except in the ordinary course of business or as is otherwise consistent with this Final Judgment, Suiza Foods Corporation shall not hire and shall not transfer or terminate, or alter, to the detriment of any employee, any current employment or salary agreements for any employees who on the date of the filing of this proposed Final Judgment work at the Southern Belle Dairy, unless such individual has a written offer of employment from a third party for a like position.

J. Until such time as the Southern Belle Dairy is divested, it shall be managed by Martin Shearer. Mr. Shearer shall have complete managerial responsibility for the Southern Belle Dairy, subject to the provisions of the Final Judgment. Following consummation of Suiza Foods Corporation's acquisition of Broughton Foods Company and until the divestiture required by Section IV. A. or V of the Final Judgment has been accomplished, and in the event that Mr. Shearer is unwilling or unable to perform these duties, Suiza Foods Corporation shall appoint, subject to plaintiff's approval, a replacement acceptable to plaintiff within ten (10) working days. Should Suiza Foods Corporation fail to appoint a replacement acceptable to plaintiff within ten (10) working days, plaintiff shall appoint a replacement.

K. Suiza Foods Corporation shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestiture pursuant to the Final Judgment to a suitable purchaser.

L. Within twenty (20) calendar days of the filing of this Final Judgment, Suiza Foods Corporation shall deliver to the United States an affidavit which describes in detail all actions Suiza Foods Corporation has taken and all steps Suiza Foods Corporation has implemented on an on-going basis to preserve the Southern Belle Dairy pursuant to Section VIII of this Final Judgment. The affidavit also shall describe, but not be limited to, Suiza Foods Corporation's efforts to maintain and operate the Southern Belle Dairy as an active competitor, maintain the

independent management, staffing, sales, marketing, and pricing of the Southern Belle Dairy and maintain the Southern Belle Dairy in operable condition at current capacity levels. Suiza Foods Corporation shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Suiza Foods Corporation's earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

## IX.

### COMPLIANCE INSPECTION

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the plaintiff, including consultants and other persons retained by the United States, shall, upon the written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Suiza Foods Corporation or Broughton Foods Company made to their principal offices, be permitted:

1. access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, which may have counsel present, relating to any matters contained in this Final Judgment; and

2. subject to the reasonable convenience of defendants and without restraint or interference from them, to interview either informally or on the

record, directors, officers, employees, and agents of defendants, which may have counsel present, regarding any such matters.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, made to defendants at their principal offices, defendants shall submit written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

C. No information nor any documents obtained by the means provided in Sections VIII or IX shall be divulged by any representative of the plaintiffs to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a defendant to the plaintiff, such defendant represents and identifies in writing the material in any such information or documents for which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the plaintiff shall give ten (10) calendar days' notice to defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which defendant is not a party.

X.

RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation, or modification of any of the provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XI.

TERMINATION OF PROVISIONS

Unless this Court grants an extension, this Final Judgment will expire on the tenth anniversary of the date of its entry.

XII.

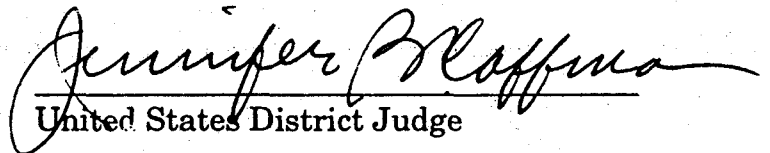
PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

Dated: \_\_\_\_\_

8/30/99

Court approval subject to procedures of  
Antitrust Procedures and Penalties Act,  
15 U.S.C. § 16.

  
United States District Judge

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BEFORE THE  
UNITED STATES DEPARTMENT OF JUSTICE

----- X  
In Re: : ORIGINAL  
CIVIL INVESTIGATIVE DEMAND : Volume 1  
NO. 21840 :  
----- X

Kansas City, MO  
July 16, 2002

Deposition of GARY HANMAN, a witness herein, called  
for examination by counsel for the United States  
Department of Justice in the above-entitled matter,  
pursuant to notice, taken at the Embassy Suites  
Hotel, 7640 N.W. Tiffany Springs Parkway, Kansas  
City, Missouri, scheduled for 8:30 a.m., before Mary  
K. Martin, a Certified Court Reporter and Notary  
Public in and for the State of Missouri.

## A P P E A R A N C E S

On behalf of the Department of Justice:

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Ms. Jody Boudreault

Antitrust Division

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GARY HANMAN,

of lawful age, after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Whereupon, Exhibit No. 1 was marked for identification by the reporter.)

DIRECT EXAMINATION

BY MR. DONALDSON:

Q. Good morning.

A. Good morning.

Q. My name is J.D. Donaldson. I'm an attorney with the Antitrust Division of the U.S. Department of Justice. With me is Jody Boudreault, who is also an attorney. For purposes of this deposition, we are investigators on behalf of the U.S. Department of Justice.

Would you please state and spell your name for the record.

A. Yeah. My name is Gary Hanman, and that's spelled G-a-r-y H-a-n-m-a-n.

Q. And are you represented by counsel today?

A. Yes, I am.

Q. And are Messrs. Miller and Geisler your attorneys?

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1 A. Yes.

2 MR. DONALDSON: Aside from Mr.  
3 Hanman, Mr. Miller, Mr. Geisler and Ms.  
4 Boudreault, myself, and the reporter, let the  
5 record reflect that all others have been  
6 excluded from the room at this time.

7 Q. (BY MR. DONALDSON) Please take a moment and  
8 take a look at what has been marked as Exhibit  
9 No. 1. It is a double-sided document.

10 Okay, have you reviewed the document?

11 A. I've looked at it, yes.

12 Q. This CID is addressed to the person or persons  
13 most knowledgeable about DFA's partial  
14 acquisition of Southern Belle Dairy, including  
15 the venture's formation, operation, customers,  
16 competition, any efficiencies expected. Are  
17 you that person?

18 A. Yes, one of them.

19 Q. Who else?

20 A. We have a -- we've had a lot of people in DFA  
21 working on details. That would be a Joel  
22 Clark, David Meyer, David Geisler. Some  
23 outside consultants from Deloitte & Touche. Of  
24 course, Bob Allen. Jerry Bos. That's the ones  
25 I can think of off the top of my head.

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1 Q. Are any of those individuals more knowledgeable  
2 about these subjects than you are?

3 A. Probably not in total. Maybe on some detail of  
4 it but not in total.

5 Q. The CID is also addressed to the person most  
6 knowledgeable about DFA's prior dealings with  
7 Robert Allen. Are you that person?

8 A. I would be one of them.

9 Q. And the others would be?

10 A. The same people mentioned before that were  
11 involved in the prior joint ventures with Bob  
12 Allen.

13 Q. And are they more knowledgeable about it than  
14 you?

15 A. Not in total. Probably in some details they  
16 might be but not in total.

17 Q. Lastly, the CID is addressed to the person most  
18 knowledgeable about other similar DFA fluid  
19 milk processing ventures. Are you that person?

20 A. Probably.

21 Q. Do you understand that this Civil Investigative  
22 Demand marked as Exhibit 1 compels your full  
23 and truthful testimony here today?

24 A. Yes.

25 Q. Sir, under the oath you have taken today, you

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1 have the obligation to answer my questions  
2 fully and truthfully. Is there any reason why  
3 you might not be able to answer my questions  
4 fully and truthfully?

5 A. Not that I -- no, I know of none.

6 Q. You have the right to answer a question "I  
7 don't recall" but if you have any recollection  
8 about the information that I'm asking about, if  
9 you answer "I don't recall," that could be a  
10 response that might subject you to prosecution.  
11 Do you understand that?

12 A. If I don't recall, I don't recall.

13 Q. If you don't recall. But if you have a  
14 recollection of what I'm talking about and you  
15 answer "I don't recall," that's a response that  
16 could potentially subject you to prosecution;  
17 do you understand that?

18 A. I understand that you want me to testify  
19 truthfully, but if you ask me for some specific  
20 details about some subject, I may not be able  
21 to give you all the details about that subject.

22 Q. Okay. But if you have a general recollection,  
23 you would testify to that recollection; is that  
24 correct?

25 A. That's correct.

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1 Q. Okay. Under Section 102, Part 7A of the  
2 Antitrust Civil Process Act, you are required  
3 to answer the questions I asked unless you can  
4 assert a privilege or a constitutional right.

5 Do you understand that you are  
6 appearing here today as a witness in the  
7 Department of Justice's investigation into the  
8 acquisition of the Southern Belle Dairy by  
9 Dairy Farmers of America and the Allen Family  
10 Limited Partnership?

11 A. Yes.

12 Q. When I use the term "Dairy Farmers of America"  
13 or "DFA" or the term "you" during the  
14 deposition, it includes DFA and its  
15 subsidiaries, joint ventures or affiliates,  
16 including Mid-Am Capital and any predecessor  
17 entities such as Mid-America Dairymen.

18 Please acknowledge if you understand  
19 that use of the term "DFA."

20 A. Okay, I understand the definition of what you  
21 just gave me, yeah.

22 Q. Okay. And when I use the term "Allen" or  
23 "AFLP," I'm referring to the Allen Family  
24 Limited Partnership or AFLP and any of its  
25 subsidiaries, joint ventures or affiliates,

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1 and any predecessor entities if there are any.

2 Do you understand that use of the  
3 term "Allen" or "AFLP"?

4 A. Yes, I do.

5 Q. Have you had your deposition taken anytime  
6 since the Department's deposition of you in  
7 connection with the merger of Suiza Dean last  
8 year?

9 A. No.

10 Q. Let me explain briefly how the deposition will  
11 proceed. I'll ask you a series of questions  
12 which you'll answer. Everything that's spoken  
13 in the room is taken down by the reporter. If  
14 I ask you a question that you can't hear or  
15 don't understand, please let me know and I will  
16 repeat it or rephrase it. If you answer a  
17 question, the assumption will be that you  
18 understood it. Please allow me to finish my  
19 questions before answering so the reporter can  
20 take down everything that's said. Please  
21 answer questions verbally as opposed to  
22 gesturing or nodding as that allows the  
23 reporter to take down what's been said. If you  
24 would like to take a break, please let me know,  
25 but I would ask that you answer any question

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1 that I have asked before taking a break.

2 Do you have any questions about these  
3 instructions?

4 A. I do not.

5 Q. Did you discuss your deposition in this matter  
6 with anyone other than counsel?

7 A. Yes.

8 Q. Who?

9 A. My wife.

10 Q. Anyone else?

11 A. My secretary. The Chairman of the Board,  
12 Herman Brubaker, knows I'm being deposed today.

13 Q. What did you discuss with your secretary?

14 A. That I was being deposed.

15 Q. Did you talk about the substance of your  
16 deposition or the topic of the deposition?

17 A. I don't believe we did.

18 Q. Did you discuss the subject of the deposition  
19 with Herman Brubaker?

20 A. Yes, in concept.

21 Q. When did you talk to him?

22 A. I think yesterday.

23 Q. How long did the conversation last?

24 A. The whole conversation?

25 Q. Yes.

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- 1 A. Oh, we talked a lot about a lot of other things  
2 besides the deposition, you understand?
- 3 Q. Okay. How long did the discussion with respect  
4 to the deposition take place?
- 5 A. Five minutes.
- 6 Q. And what did you discuss with him?
- 7 A. The fact I was being deposed by U.S. Department  
8 of Justice with respect to the Southern Belle  
9 partial acquisition.
- 10 Q. Okay. Did you discuss your deposition with  
11 anyone else other than counsel?
- 12 A. I don't believe so other than the ones I've  
13 mentioned.
- 14 Q. Okay. Have you seen or heard anything about  
15 Robert Allen's deposition?
- 16 A. Have I seen it?
- 17 Q. Seen or heard anything about Robert Allen's  
18 deposition?
- 19 A. I've heard something about it.
- 20 Q. Other than through counsel?
- 21 A. No.
- 22 Q. Did you review any documents to prepare for  
23 this deposition other than with counsel?
- 24 A. No.
- 25 Q. Did you take any documents with you to this

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1 deposition?

2 A. No.

3 Q. What is your title at DFA?

4 A. CEO and President.

5 Q. And how long have you been CEO and President?

6 A. From January 1 of '98, which was the start date  
7 of DFA.

8 Q. Until today?

9 A. Yes, until today.

10 Q. Briefly describe your responsibilities as CEO  
11 and Chairman?

12 A. I'm not Chairman.

13 Q. Okay. President.

14 A. I'm CEO and President.

15 I have the general administrative  
16 duties of running the business, the business of  
17 DFA. That would be the directly or indirectly  
18 hiring and firing of all people involved in the  
19 company. It would be running the business in  
20 the normal sense of directing the business  
21 affairs. It would include the normal functions  
22 you would associate with the President, the  
23 Chief Administrative Officer of a company.

24 Q. How often does DFA do its strategic planning?

25 A. Once a year.

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1 Q. Okay. And even though you had a minority  
2 interest in the Suiza dairy group, did you not  
3 have some kind of say over what Suiza could and  
4 couldn't do with its --

5 A. No.

6 Q. -- dairy group?

7 A. No..

8 Q. Did you or to your knowledge anyone at DFA  
9 receive a copy of the Broughten consent decree?

10 A. Oh, I'm sure we did.

11 Q. Okay. Have you seen it?

12 A. No, I don't believe I've ever read it.

13 Q. To your knowledge, have others at DFA read it?

14 A. I would hope Geisler has read it.

15 Q. Anyone else?

16 A. Not that I know about. That's who I would rely  
17 on to tell me what's in it.

18 Q. To your knowledge, what's your understanding of  
19 why that decree was entered into?

20 A. One was Suiza a wanted to buy Broughten; two,  
21 in order to get that acquisition approved, they  
22 had to dispose of Somerset.

23 Q. Why?

24 A. Because of the overlap that it had with PET,  
25 the PET plants and Land-O-Sun -- I mean

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1 Flav-O-Rich.

2 Q. Which PET plants?

3 A. Probably Land-O-Sun -- probably New London

4 would be one and then the PET plants over in

5 the Virginia, eastern Tennessee area.

6 Q. The tri-city area?

7 A. The tri-city area.

8 Q. Was there any plant in particular that it was

9 your understanding of a problematic overlap?

10 A. No, none in particular. Just all of those.

11 Plus, I believe -- I'm not sure but I believe

12 Southern Belle went south into Tennessee and I

13 think they were in on the fringes of Nashville

14 and Suiza owned the plant in Nashville at that

15 time, as I recall, so you had some overlap

16 there.

17 Q. Country Delite?

18 A. Yeah, Country Delite.

19 Q. The box milk plant?

20 A. Yeah.

21 Q. When you sold your interest in the Suiza dairy

22 group and you received the divestiture plans

23 from Suiza Dean, did you receive a copy of the

24 Broughten consent decree?

25 A. I don't know.

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1 discussions regarding this financing of  
2 Southern Belle?

3 A. I don't think I did.

4 Q. To your knowledge, did anyone else take any  
5 notes or were any other written records made?

6 A. Not that I recall. But I don't think this was  
7 ever approved.

8 Q. Why didn't NDH acquire Southern Belle?

9 A. This is my recollection of what happened, okay?

10 Q. Counsel nods head.)

11 A. About the time NDH had the deal with the  
12 principals of Southern Belle, the owners, the  
13 Suiza Dean merger was going through Justice.  
14 And during this period of NDH development, we  
15 were targeting for six plants that were going  
16 to be spun off and in the end, in order to get  
17 Justice approval, Dean Suiza had to spin off 11  
18 plants. Not six; 11. And two of those plants  
19 -- this is my recollection now -- were not a  
20 part of the original six, two of those were New  
21 London and U.C. Milk company. And so now you  
22 have a different landscape from a competitive  
23 point of view of NDH and Southern Belle in that  
24 now NDH owns New London, Flav-O-Rich, and owns  
25 this other plant in western Kentucky.

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1 Q. U.C. Milk Goldenrod; right?

2 A. Yeah. So now we have Southern Belle in the

3 middle of this, and my recollection was legal

4 counsel was saying there is no way you are

5 going to get it approved, Justice won't approve

6 this much concentration, and so they decided

7 not to do it.

8 Q. The Suiza Dean divestitures were decided upon

9 in December --

10 A. Late December.

11 Q. -- middle to late December -- middle December,

12 actually, prior to Christmas. My question to

13 you is, what is your understanding as to why

14 Tracy Noll would have reached a verbal

15 agreement for NDH to acquire Southern Belle

16 after learning of the final divestiture package

17 in Suiza Dean?

18 A. Now, I don't know the timing. You are asking

19 me for timing when did he know and --

20 Q. I'll represent to you the divestiture in Suiza

21 Dean was completed at least a week before

22 Christmas of 2001. What's your understanding

23 as to why Tracy Noll would reach an agreement

24 to purchase Southern Belle --

25 A. I don't know, maybe he hadn't got legal opinion

1 at that point. I don't know. These lawyers  
2 work awful slow.

3 Q. No comment.

4 A. Can I take five?

5 Q. Sure.

6 A. Are you about at a good breaking point?

7 Q. That's fine.

8 (Recess.)

9 Q. (BY MR. DONALDSON) We talked a little bit  
10 about why NDH didn't buy Southern Belle. Do  
11 you think DFA could have bought Southern Belle  
12 by itself?

13 A. I don't know. Financially, you mean? Did we  
14 have the wherewithal?

15 Q. No. The same reasons you talked about NDH?

16 A. I don't know.

17 Q. Have you given any thought to it?

18 A. Did we?

19 Q. Have you?

20 A. No.

21 Q. No?

22 A. No. We wouldn't think about it.

23 Q. When was the next time that DFA discussed with  
24 anyone potentially acquiring an interest in  
25 Southern Belle, are we up to Bob Allen now?

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1 A. Yes.

2 Q. Okay. And what happened there? When was the

3 first contact made to Bob Allen?

4 A. It was by phone, I'm sure either I called him

5 or Jerry Bos called him, one of the two, to see

6 if he had an interest, and he did. And, as I

7 recall, he came in to Kansas City and visited

8 with us about it.

9 Q. When was that first call made?

10 A. I don't know, sometime after NDH couldn't do

11 the deal.

12 Q. Approximately January 10th; would that sound

13 right?

14 A. It sounds close.

15 Q. Okay. And do you recall whether it was you,

16 Mr. Bos or both of you on the phone with Mr.

17 Allen?

18 A. I don't recall. Normally, I would make the

19 first call and then he would follow up with

20 Jerry or some other people in Accounting or

21 whoever, but I do remember he came to Kansas

22 City.

23 Q. What was discussed on that first call with Mr.

24 Allen?

25 A. My recollection is that we asked him, Are you

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CERTIFICATE

I, MARY K. MARTIN, a Certified Court Reporter, with offices at 1930 Commerce Tower, Kansas City, Missouri, do hereby certify that I was present at the proceedings as set forth in the caption sheet hereof; that I then and there took down in shorthand the proceedings had at that time, and the foregoing pages constitute a true and accurate transcript of the shorthand notes made at that place and time.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of July, 2002.

Mary K. Martin

Certified Court Reporter  
No. 0255

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